LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 9 1962
JOHN F. DAVIS, CLERK

No. 552

In the

Supreme Court of The United States

October Term, 1961

ESTATE OF LEO M. GARTLAND, Deceased,
MATTHEW GARTLAND, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER

SOL GOODMAN
Counselor at Law
1016 Fifth Third Bank Bldg.
Cincinnati 2, Ohio
Attorney for Petitioner

Of Counsel:
STANLEY GOODMAN
Cincinnati, Ohio
M. S. CASSEN
Indianapolis, Indiana

ARCHIBALD COX
Solicitor General
LOUIS F. OBERDORFER
Assistant Attorney General
MEYER ROTHWACKS
JOSEPH KAVNER
Attorneys
Department of Justice, Washington, D. C.

Court Index Press, Inc. — Law Printers — 809 Walnut Street Cincinnati 2, Ohio

CASES CITED

———

	Page
Commissioner of Internal Revenue v. Estate of Ridgeway, 291 F.2d 257	4, 5
Gartland Estate v. C.I.R., 293 F.2d 575	1, 6
Higgs' Estate v. C.I.R., 184 F.2d 427	4
Kohl v. United States, 226 F.2d 381	3
Smyth v. Cleveland Trust Co., 172 O. S., 489	3
U. S. v. Hubner, Ninth Circuit, 285 F.2d 29	4
U. S. v. Merchants National Bank of Mobile, Fifth Circuit, 261 F.2d 570	4
U. S. v. Turner, Eighth Circuit, 287 F.2d 821	4

In the

Supreme Court of The United States

October Term, 1961

No. 552

ESTATE OF LEO M. GARTLAND, Deceased,
MATTHEW GARTLAND, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER

The issues and contentions in this case are extensively covered in Petitioner's Brief and are fully covered in the Opinion of the Court of Appeals, *Gartland Estate* v. *C. I. R.*, 293 F.2d 575. Respondent's Brief grossly simplifies the issue and erroneously concludes, "The conclusion below is correct, *and no conflict of decisions is claimed.*" Petitioner contends that the Decision below is incorrect and is in conflict with a line of Decisions by the various Courts of Appeal and, in some cases, by this Court, which have been rendered during a period of thirty (30) years.

The Decision of the Court of Appeals in the instant case is directly contrary to the Government's own position since 1931 on questions involved in the instant case.

What the Lower Courts have held in this case is that when a person created a Trust in 1929, giving the Trustee

discretion in the payment of income to the beneficiary during his life, but providing that the beneficiary may amend by taking the income or terminate by taking the entire Estate, that the mere taking of income constitutes a taking of the entire estate, retaining the income and disposing of the corpus.

This is contrary to the clear intention of the donor and is contrary to the intention of the beneficiary when he asked for the income. In effect, the Courts' Decisions hold that by taking the income it follows that it constitutes a taking of the principal. To put it in another form, the Court's Decision holds that the taking of the fruit constitutes a taking of the tree.

In Petitioner's Brief, on Pages III and IV, there are listed thirty (30) Decisions, several State and Federal Statutes, and it is Petitioner's contention that the Decision in the instant case does violence to the language of the Statutes and is in direct conflict with the holdings in all of the cases.

Respondent (Page 7) invokes the Court of Appeals' construction of Treasury regulation (Section 20.2041-2(d) of Treasury Estate Tax Regulations) that if at or before the time a power of appointment is relinquished, the holder of the power exercises the power in such a manner or to such an extent that the relinquishment results in the reduction, enlargement or shift in a beneficial interest in property, the relinquishment will be considered to be an exercise and not a release of the power. If the regulation is held to have the meaning given it by the Court of Appeals, then it is not to be sustained as being contrary to the Congressional Enactment.

In Respondent's Brief (Page 2), the question presented is set forth as "where the decedent, by an exercise of the power, had vested in himself the right to the income and,

by a subsequent surrender of the power, had caused the remainders to become vested". What is overlooked is the fact that the remainder became vested in the widow and children at the time the Trust was created.[1] The decedent had a power of appointment to defeat the remainder interest in part or in whole. To the extent of the amount taken under such power, the remainder was decreased. To the extent of the portion not taken, the remainder continued vested as it became vested at the time when the Trust was created.

It is obvious that there is fallacy in Respondent's reasoning. The taking of the income by the beneficiary without, in any way, exercising his power of appointment over the remainder, but, on the contrary, releasing the power as to the future, simply left the vested remainder as it had been rather than in any way defeating it. It cannot be said that this was the equivalent to termination of the Trust, which is a taking of the corpus as well as the income and a disposition thereof, all without a stroke of the pen.

If the decedent's exercise of the power by taking of the income is to be construed as the exercise over the principal as well, then the decedent became vested with principal and income in 1931 or 1938. In 1945, the release of his power of appointment over the Trust would be ineffective because the Trust, having terminated in 1938, you cannot release what no longer exists. This just points out the fallacy of the reasoning of Respondent, which false logic has convinced the Lower Courts to a Decision which, we believe, completely erroneous.

The Respondent concludes his Petition with "and no conflict of decisions is claimed." Petitioner certainly did

---

[1] "At the instant of creation of the trust, there arises a vested interest in the remaindermen, subject to defeasance in whole or in part by the exercise of the power to revoke or modify" *Smyth* v. *Cleveland Trust Co.*, 172 O.S., 489.

and does claim that the instant Decision is in conflict with various prior Decisions. (Pet. 45) It is set forth:

> The Decision of the Court of Appeals is in conflict with an earlier Decision by the same Court in *Kohl* v. *United States*, 226 F.2d 381."

(Pet. 44) It is set forth:

> "For nearly thirty (30) years, the Federal Courts have uniformly and consistently followed *Brown* v. *Routzahn*, 63 F.2d 914 (Sixth Circuit), wherein the Court held that the renunciation by a devisee of a legacy was permissible, and that the same was not includible in his Estate, . . ."

To the same effect was the holding by the Court of Appeals of the Third Circuit in *Higgs' Estate* v. *C. I. R.*, 184 F. 2d 427.

We respectfully direct the Court's attention to Petitioner's Brief (Pet. 43) where we point out that the instant case conflicts with the holdings by the Fifth, Eighth and Ninth Circuits in their Decisions in *U. S.* v. *Merchants National Bank of Mobile*, Fifth Circuit, 261 F.2d 570; *U. S.* v. *Hubner*, Ninth Circuit, 285 F.2d 29; *U. S.* v. *Turner*, Eighth Circuit, 287 F.2d 821. When we argue in our Brief that the instant Decision is in direct conflict with prior Decisions of the Third, Fifth, Sixth, Eighth and Ninth Circuits, it is hardly consistent with Respondent's argument that no conflict is claimed.

We respectfully direct the Court's attention to the case of *Commissioner of Internal Revenue* v. *Estate of Ridgeway*, 291 F.2d 257, which was decided on June 1, 1961, and not published until after the Decision in the instant case. A reading of that Decision clearly indicates a complete conflict with the Gartland Decision. In the Gartland case, the Trust was executed in 1929. The beneficiary asked for, and received, the income in 1931 and confirmed

by a formal request in 1938. The beneficiary released his power of appointment in 1945 and died in 1955. The Court held that taking the income by the donee is equivalent to the taking of the corpus and, thus, equivalent to the keeping of the income and the disposition or transfer of the corpus. This logic is based upon a pyramid of "equivalents".

In the *Ridgeway Estate* case, the Trust was created in 1930 with the income payable to his (decedent's) wife for life and, upon her death, to decedent, if living, for his life. The decedent reserved a power to make changes with respect to the distribution of principal or income. The decedent relinquished this power in 1944. The decedent died in 1953. The Court held that the Commissioner was wrong in including the Trust in the Estate. In its Opinion, the Court said:

> "The Commissioner advances an elaborate argument in which he intertwines judicial decisions with statutory enactments and legislative history. He begins with the decision of the Supreme Court in May v. Heiner, 1930, 281 U.S. 238, 50 S. Ct. 286, 74 L. Ed. 826, which held that retention of a contingent life interest by the settlor of an irrevocable trust until the date of his death did not result in the inclusion of the corpus in the settlor's gross estate because title to the property was fixed by the trust deed, and it was not, therefore, in the settlor's possession at the time of his death. On March 3, 1931, Congress, in response to the May decision passed a joint resolution, 46 Stat. 1516, amending the estate tax law by providing that property transferred subject to life interests reserved in settlor-transferor was includible in a decedent's gross estate. The Supreme Court in Commissioner of Internal Revenue v. Church's Estate, 1949, 335 U. S. 632, 69 S. Ct. 322, 337, 93 L. Ed. 288, overruled May, thereby causing preresolution transactions involving a transfer of property subject to life interest to be included in the gross estate. Because of

> concern over hardships that this change might bring about, Congress in 1949 enacted § 7 of the Technical Changes Act, which provided that § 811(c)(1)(B) would not apply to a 'transfer made prior to March 4, 1931.' 26 U.S.C.A. § 811 note. The congressional purpose underlying this exception was the protection of decedents who acted in reliance on the May decision as to pre-1931 transactions. The Commissioner contends that the exception provided in the last sentence of § 811(c) is inapplicable to any transfer of property in trust other than one which is identical to that involved in May."

We contend that the above holding is in direct conflict with *Gartland's Estate* v. *C. I. R.*, 293 F.2d 575 at Page 580:

> "Petitioner next argues that since the decedent did not attempt to control or change the disposition of the trust property at his death, he did not by the documents of 1931 and 1938 exercise his power of appointment. This argument is equally untenable. The exercise of a power of appointment is no less an exercise, because the decedent did not by the exercise control or change the disposition of the property at his death. Petitioner probably means by his argument that the exercise of a general power of appointment was not taxable, because he did not change the disposition of the trust property. Section 2041 imposes the tax upon the exercise of a pre-1942 general power of appointment and not upon the disposition of property by the exercise."

We respectfully submit that Respondent's Brief fails to meet the question presented. The Decision of the Lower Court is in conflict with principles of law and standards of practice applied to administration of Estates for over thirty (30) years and is in direct conflict with the recent holdings in the *Ridgeway Estate* case, and this Court

should grant the Petition for a Writ of Certiorari and, upon hearing, reverse the Decision of the Court of Appeals.

Respectfully submitted,

Of Counsel:
STANLEY GOODMAN
Cincinnati, Ohio
M. S. CASSEN
Indianapolis, Indiana

SOL. GOODMAN
Counselor at Law
1016 Fifth Third Bank Bldg.
Cincinnati 2, Ohio
Attorney for Petitioner

ARCHIBALD COX
Solicitor General
LOUIS F. OBERDORFER
Assistant Attorney General
MEYER ROTHWACKS
JOSEPH KAVNER
Attorneys
Dept. of Justice, Washington, D. C.